

APR 18 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5958

DATE COMPLAINT FILED: December 6, 2007

DATE OF NOTIFICATION: December 12, 2007

LAST RESPONSE RECEIVED: January 22, 2008

DATE ACTIVATED: January 22, 2008

EXPIRATION OF SOL: October 1, 2012 –
November 30, 2012

COMPLAINANT:

C. Richard Cranwell, Chairman
Democratic Party of Virginia

RESPONDENT:

Tom Davis for Congress and Mary Jane Sargent,
in her official capacity as treasurer

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 441d(a)
2 U.S.C. § 434(b)(4)
2 U.S.C. § 439a(a)(5)
2 U.S.C. § 439a(a)(6)
2 U.S.C. § 441i(e)(1)(B)
11 C.F.R. § 110.11(a)(1)
11 C.F.R. § 110.11(b)(1)
11 C.F.R. § 110.11(c)(1)
11 C.F.R. § 100.26
11 C.F.R. § 100.27
11 C.F.R. § 104.3(b)
11 C.F.R. § 300.62
11 C.F.R. § 300.2(d)(1)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves allegations that Tom Davis for Congress and Mary Jane Sargent, in
her official capacity as treasurer ("the Committee") paid for communications supporting the

re-election campaign of a nonfederal candidate without including the disclaimers required by 2 U.S.C. § 441d(a) of the Federal Election Campaign Act of 1971, as amended, ("the Act").

Specifically, complainant alleges that the Committee paid for approximately \$400,000 of television and print media communications which resulted in-kind contributions to the Virginia State Senate campaign of Congressman Tom Davis' spouse, Jeannemarie Devolites Davis, and that those communications should have contained disclaimers disclosing that the Committee paid for them. Complaint, dated November 2, 2007.

Respondent requests that the Commission take no action in this matter, asserting that the disclaimer requirements set forth in 2 U.S.C. § 441d are not applicable, because the communications at issue were made solely in connection with a State, not federal, election. Response, dated January 14, 2008.

Based upon the information contained in the complaint and response, and other publicly available information, we recommend that the Commission dismiss the complaint as a matter of prosecutorial discretion and issue an admonishment to Tom Davis for Congress and Mary Jane Sargent, in her official capacity as treasurer. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

During October and November 2007, the Committee disbursed \$729,952.12 of in-kind and direct contributions to the Devolites Davis State Senate campaign. According to disclosure reports filed with the Commission, the Committee disbursed \$434,412.12 for in-kind contributions to Devolites Davis' State Senate campaign, broken down as follows: \$365,175 to a media production company for television broadcasts; \$61,399.75 for printing and mailing written

10044272448

1 communications; and \$7,837.37 for utility, office space, staff salary and other miscellaneous
2 expenses. 2007 Year-End Report, Schedule B. In addition, the Committee disclosed \$295,000
3 in direct contributions to the Devolites Davis State Senate campaign. *Id.* It appears that the
4 Committee complied with the Act's reporting requirements when disclosing the disbursements.
5 2 U.S.C. § 434(b)(4); 11 C.F.R. § 104.3(b). All of the funds used by the Committee to make
6 contributions to the Devolites Davis State Senate campaign appear to have been raised in
7 compliance with the limits and prohibitions of the Act. The Devolites Davis State Campaign
8 committee reported to the Virginia State Board of Elections the receipt of in-kind contributions
9 from the Committee and related disbursements to vendors in amounts which correspond to that
10 which the Committee disclosed to the Commission. Complaint, at Exhibit A.

11 The complaint provided samples of the communications supporting Devolites Davis,
12 which it alleges the Committee purchased but lacked the appropriate disclaimers pursuant to
13 2 U.S.C. § 441d(a). Complaint, at Exhibit B. Two of the communications are printed campaign
14 advertisements, one is a script for a television advertisement, and another is a reference to a
15 television advertisement at <http://www.youtube.com/watch?v=iGZkIydbOeY>. *Id.*
16 The communications either support the re-election of Devolites Davis to State office or attack her
17 opponent. The communications make no mention of Congressman Tom Davis, any federal
18 election, or federal candidate. *Id.* The advertisements contain disclaimers that they were paid for
19 and/or sponsored by Ms. Devolites Davis' State committee. *Id.* Respondent contends that the
20 disclaimers contained on the communications comply with Virginia disclosure laws governing
21 State elections. Response, at 3.

10044272449

1 According to the response, Jeannemarie Devolites Davis for State Senate Committee
2 initially paid for the production, broadcast, and mailing of the communications at issue.
3 Response, at 3 - 4. However, beginning in October 2007, the Committee paid for the cost of end-
4 of-campaign broadcasts and distribution of print advertisements. *Id.* Respondent states that "the
5 advertisements did not change, only the technicality of who paid for a particular broadcast or
6 other distribution changed." *Id.*

7 **B. Legal Analysis**

8 **1. Permissible Non-Campaign Use of Funds**

9
10 The Act expressly permits federal candidates and officeholders to donate campaign funds
11 from their authorized committees to State and local candidates subject to the provisions of State
12 law. 2 U.S.C. § 439a(a)(5). In addition, federal campaign funds can be used for "any other
13 lawful purpose" other than personal use. 2 U.S.C. § 439a(a)(6); *see also* AOs 2007-29 (Jackson)
14 and 2000-32 (Martinez)(donation of funds to State and local candidates permissible). The
15 Committee's in-kind and direct contributions to the Devolites Davis State Senate campaign
16 appear to constitute permissible non-campaign use of funds. 2 U.S.C. § 439a(a)(5) and (6).

17 Neither the Act, and its implementing regulations, nor Virginia State law limit the amount
18 of funds that the Committee may donate to Ms. Devolites Davis' State Senate campaign.¹

19 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62. With respect to non-Federal elections,

¹ There are no contribution limits in Virginia. A committee can accept contributions from any individual, corporation, union, association or partnership (except foreign nationals or foreign corporations). It is only required that all contributions received by the committee, and that all required information identifying the contributor, be reported on the committee's campaign finance reports. Virginia State Board of Elections, *Summary of Virginia's Campaign Finance Laws and Policies for Candidate Campaign Committees*, Section 3.1 (revised July 1, 2007), http://www.sbe.virginia.gov/cma/Campaign_Finance_Disclosure/Index.html.

Commission regulations also require that funds raised and spent by federal candidates and committees be in amounts and from sources that are consistent with both the Act and applicable State law. 11 C.F.R. § 300.62. A review of the disclosure reports reveals that the funds disbursed by the Committee comply with the amount and source limits of the Act and Commission regulations. Accordingly, the amount of funds the Committee may donate to Ms. Devolites Davis' State Senate Campaign committee is not restricted by 2 U.S.C. § 441i(e)(1)(B) or 11 C.F.R. § 300.62, because there are no contribution limits in Virginia. See discussion at n.1, *supra*.

2. Disclaimer Requirements

The Act requires a disclaimer whenever a political committee makes a disbursement "for the purpose of financing any communication through any broadcasting station,.....mailing, or any other type of general public political advertising..." 2 U.S.C. § 441d(a). Furthermore, the regulations require that "all public communications" made by a political committee must include a disclaimer. 11 C.F.R. § 110.11(a)(1). A public communication includes any broadcast, cable, or satellite communication or mass mailing. 11 C.F.R. § 100.26. A "mass mailing" means a mailing by United States mail of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. 11 C.F.R. § 100.27.

Section 441d(a), as further explained in 11 C.F.R. § 110.11(a)(1), requires a disclaimer on all public communications for which a political committee makes a disbursement, without regard to content or purpose. In 2002, the Explanation and Justification for 11 C.F.R. § 110.11(a)(1) stated, "[t]he scope of the disclaimer requirement for political committees [was expanded] beyond communications constituting express advocacy and communications soliciting

10044272451

contributions." 67 Fed. Reg. 76962, 76964 (December 13, 2002). In 2006, the disclaimer regulation was revised to require disclaimers on all public communications "made by a political committee." 11 C.F.R. § 110.11(a)(1).

The disclaimer must be presented in a "clear and conspicuous manner" in order to give the reader, observer or listener "adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication." 11 C.F.R. § 110.11(c)(1). A disclaimer, if paid for and authorized by a candidate or an authorized committee of a candidate, must clearly state that the communication has been paid for by the authorized political committee. 11 C.F.R. § 110.11(b)(1).

Beginning in October 2007, the Committee paid \$365,175 to a media production company for television broadcasts and \$61,399.75 for printing and mailing of written communications in support of Devolites Davis. 2007 Year-End Report, Schedule B. The Committee, Tom Davis' principal campaign committee, meets the definition of a "political committee" as defined by the Act. 2 U.S.C. § 431(4) and (5). The Committee's payments to vendors for the television broadcasts and printing and mailing of written communications constituted disbursements for public communications.² 11 C.F.R. §§ 300.2(d)(1), 100.26 and 100.27. Accordingly, disclaimers were needed for all communications paid for directly by the Committee with federal campaign funds, without regard to content, even though the communications were in connection with a non-federal election. 2 U.S.C. § 441d(a).

² While we do not have specific information that the written communications were comprised of more than 500 pieces of substantially similar mail, it appears from the costs of the printing and mailing (e.g., \$61,399.75) that they met the regulation's quantity requirements for mass mailings.

However, given the totality of the circumstances in this matter, which include the fact that the advertisements contained a disclaimer as to the State candidate's information, and that all of the expenses were timely reported to the Commission as in-kind contributions to, and disclosed to the public by, the recipient State candidate, we recommend that the Commission exercise its prosecutorial discretion to dismiss the matter as it pertains to the Committee's violation of 2 U.S.C. § 441d(a) and send an admonishment letter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

III. RECOMMENDATIONS


1. Dismiss as a matter of prosecutorial discretion the allegation that Tom Davis for Congress and Mary Jane Sargent, in her official capacity as treasurer violated 2 U.S.C. § 441d(a) and issue an admonishment.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letter.
4. Close the file.

Thomasenia P. Duncan
General Counsel

BY:


Mark D. Shonkwiler
Acting Deputy Associate General Counsel
for Enforcement


Sidney Locke
Assistant General Counsel


Christine C. Gallagher
Attorney

4/18/08
Date